

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE GORDON,

Defendant and Appellant.

H021806

(Santa Clara County
Super. Ct. No. 210527)

Defendant Bruce Gordon appeals after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.). The trial court ordered him committed to Atascadero State Hospital (ASH) for a two-year period.

On appeal, defendant contends: (1) the trial court erred by refusing to accept defendant's offer to stipulate to his convictions of two predicate sexually violent offenses; (2) the SVPA violates the state and federal guarantees of equal protection; (3) the trial court erred by instructing the jury pursuant to CALJIC No. 4.19; (4) defendant's SVPA commitment violates the state and federal prohibitions against ex post facto laws and double jeopardy. We will affirm the judgment.

I. BACKGROUND

On November 29, 1999, the district attorney of Santa Clara County filed a petition to commit defendant as a sexually violent predator. The petition alleged that defendant was

in the custody of the Department of Corrections, with a scheduled release date of December 18, 1999. Attached to the petition was a declaration by a deputy district attorney. The declaration alleged that defendant had suffered prior convictions of qualifying sexually violent offenses: in 1984 he was convicted of 10 counts of violating Penal Code section 288, subdivision (a) (committing a lewd or lascivious act on a child) and 2 counts of violating Penal Code section 288, subdivision (b)(1) (committing a forcible lewd or lascivious act on a child). (See Welf. & Inst. Code, § 6600, subd. (b).) The declaration further alleged that two clinical evaluators had diagnosed defendant as having a current mental disorder such that he was likely to commit another sexually violent offense in the future.

The trial court held a probable cause hearing on December 16, 1999, and concluded that there was probable cause to believe that defendant was likely to engage in sexually violent predatory criminal behavior upon his release. (See Welf. & Inst. Code, § 6602, subd. (a).)

At trial, the two evaluators testified. Dr. Wesley B. Maram, a clinical and forensic psychologist, had evaluated defendant in 1996 and again in 1999. Both times, he reviewed defendant's records, including his mental health records and prison files. At both times, Dr. Maram diagnosed defendant as suffering from two mental disorders: pedophilia and alcohol dependence.

Dr. Maram reviewed the circumstances of defendant's prior convictions. In 1973, defendant was convicted of molesting an eight-year-old boy. The boy was a neighbor; the boy's parents had asked defendant to baby-sit on occasion. Defendant had brought the boy to his home and given him a bath. He had orally copulated the boy. Defendant had molested the boy on several previous occasions as well.

Defendant was placed on probation for two years and began seeing a therapist. However, in 1974, he began molesting a second young boy. According to Dr. Maram, the

fact that defendant reoffended so soon after his conviction indicates that his pedophilia was “out of control.”

Between 1974 and 1983, defendant continued to molest the second victim, who would come to defendant’s residence to use the swimming pool. Defendant’s conduct included fondling and oral copulation. During this same time period, defendant also molested a third young boy, who would also come over to use the swimming pool.

Between 1981 and 1983, defendant molested a fourth young boy, who was in the care of defendant’s sister. According to Dr. Maram, defendant’s relationship with this victim was established primarily for victimization. Again, defendant’s conduct included oral copulation and fondling. Defendant molested a fifth young boy during this same time period. The boy was a friend of the fourth victim.

Dr. Maram opined that it was “unusual” and “extreme” for a person to molest four victims during the same time period. Such behavior indicated that defendant’s disorder was intense.

In 1996, defendant admitted that he still had sexual urges toward boys. He also admitted that he was an alcoholic. However, at that time, Dr. Maram did not believe that defendant’s volitional impairment was severe enough to meet the requirements for commitment under the SVPA. He believed that defendant presented only a moderate risk of reoffense.

Defendant was paroled in 1997. As conditions of his release, he was required to abstain from alcohol, attend therapy, and not possess child pornography. When defendant missed a therapy appointment, his parole agent searched his apartment. The parole agent discovered “child lures” including pictures of nude children, photography books featuring nudes, a pornographic videotape, and children’s videotapes. According to Dr. Maram, such materials are dangerous because they can trigger fantasies and rehearsals. Defendant in fact admitted that he had been having fantasies about children and that he had been drinking alcohol.

Defendant was found in violation of parole. He was rearrested and served an eight-month prison term. At the end of the prison term, he was reevaluated for commitment under the SVPA. At that time, Dr. Maram believed that defendant had a high likelihood of reoffending.

Dr. Maram reviewed the factors underlying his opinion about defendant's risk of reoffense, which included: deviant sexual practices; prior sex offenses; failure to complete a treatment program; early onset of offending behavior; male victims; disengagement from his parole agent and therapist; alcohol abuse; and the high-stress environment created by his collection of child-oriented items.

Dr. Maram used the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), an actuarial tool. That tool considered only four factors: prior sex offense convictions not including the most recent offense (i.e., the 1984 convictions); age at time of release from prison; victim gender; and relationship to victim. Defendant scored a three on that tool, indicating a 25 percent chance of reoffense within 5 years and a 37 percent chance of reoffense within 10 years. Dr. Maram explained that the reoffense percentages were actually higher in California: defendant had a 51 percent chance of reoffense within 10 years.

Dr. Maram discussed a second actuarial tool, called the Static-99. This tool considered additional factors, including: prior sentencing dates; convictions for non-contact offenses; nonsexual violence in the recent offense; prior nonsexual violence; and victims who were strangers. Defendant would have scored a four using this tool, indicating a medium high risk of reoffense: a 26 percent chance within 5 years; a 31 percent chance within 10 years; and a 36 percent chance within 15 years. However, according to Dr. Maram, this tool underreports the prediction of reoffense among child molesters.

Dr. Amy Phenix, another clinical psychologist, also evaluated defendant in both 1996 and 1999. In 1996, defendant denied that he had any ongoing fantasies. Dr. Phenix diagnosed defendant with pedophilia, but did not believe that he was likely to engage in

sexually violent behavior if he was released from prison. In reaching this conclusion, she relied on defendant's accomplishments in treatment and his motivation to continue with treatment.

When Dr. Phenix reevaluated defendant in 1999, he admitted that he had been having fantasies about young boys. He also admitted that he had been using the materials found at his residence as stimulation for his fantasies. At that point, Dr. Phenix concluded that defendant was likely to reoffend. She believed he was volitionally impaired since he had not stopped himself from engaging in high-risk behavior (collecting the materials). In addition, he admitted that he had been stressed out, that he had been drinking, and that he had been isolating himself. Each of those factors contributed to Dr. Phenix's opinion about defendant's likelihood of reoffense.

Dr. Phenix cited additional risk factors present in defendant's case: the severity of his pedophilia, the early onset of his sexual deviancy, his excessive childhood sexuality, his lack of cooperation with authority (i.e., commission of offenses while on probation), his intimacy deficits, the fact that he blamed the victims rather than accepting his responsibility, the fact that his victims were male, and the fact that his victims were not related to him.

Defendant was called to testify for the People. He admitted having a sexual attraction to boys and suffering from pedophilia. However, he did not believe that he was likely to reoffend if released.

On June 27, 2000, the jury found the allegations in the SVPA petition true. The jury made three special findings: (1) that defendant had been convicted of two prior sex offenses that were predatory in nature; (2) that defendant had a current diagnosed mental disorder; and (3) that defendant's diagnosed mental disorder made him a danger to the health and safety of others in that it was likely that he would engage in sexually violent criminal behavior.

The trial court ordered defendant committed to ASH for a two-year period, beginning on the date of the jury's verdict. This appeal followed.

II. DISCUSSION

A. Defendant's Offer to Stipulate to Predicate Offenses

During in limine motions, defendant indicated that he would stipulate that had had previously been "convicted of a sexually violent offense against two or more victims." (§ 6600, subd. (a)(1).) In his written motion, he argued that in light of that stipulation, "the People should not be allowed to offer evidence about the underlying facts of those convictions."

At the hearing on the motion, trial counsel framed the request differently. He asked the trial court "to preclude introduction of any presentence reports or probation reports or police reports or other documentary evidence regarding the prior convictions" The trial court indicated that keeping out such documentary evidence would not be "particularly fruitful" because the psychologists had relied upon those documents and would discuss them in their testimony. Trial counsel indicated that he understood that the psychologists would be discussing "what happened during the course of the crimes" and argued that such testimony was "different than allowing the People to put in documentary evidence of these crimes when we're prepared to stipulate to them." When the People declined to accept defendant's stipulation, defendant asked the trial court to "overrule any denial or refusal by the People to stipulate" The trial court declined to do so. Defendant now contends the trial court erred by so ruling.

The People contend that defendant should not be permitted to argue that the trial court erred by allowing introduction of testimonial details of the prior convictions because he asked the trial court only to disallow introduction of documentary evidence. (See Evid. Code, § 353.) Defendant argues that once the trial court ruled that the documentary evidence could come in, there was "no point" in moving to exclude testimony about the

convictions. In other words, he claims that any further objection would have been futile. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 [“Counsel is not required to proffer futile objections.”].) We note that defendant’s written motion requested exclusion of “evidence about the underlying facts” of the prior convictions; it did not seek exclusion of only documentary evidence. Under the circumstances, we find defendant did not waive the issue whether the trial court properly admitted testimonial details of the prior convictions. However, we find that the argument lacks merit.

The prosecution “ ‘cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness.’ [Citation.]” (*People v. Garceau* (1993) 6 Cal.4th 140, 182.) If the probative value of the challenged evidence extends beyond the scope of the defense’s offer to stipulate, the prosecution is not obligated to present its case in the sanitized fashion suggested by the defense. (*Ibid.*) “If the facts to which the defendant has offered to stipulate retain some probative value, then evidence of such facts may be introduced.” (*People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on another ground in *People v. Newman* (1999) 21 Cal.4th 413.)

Defendant’s reliance on cases such as *People v. Valentine* (1986) 42 Cal.3d 170, *People v. Hopkins* (1992) 10 Cal.App.4th 1699, and *Old Chief v. United States* (1997) 519 U.S. 172, is misplaced. Those cases hold that, in a criminal case, the jury need not learn the nature of a prior conviction where the defendant’s ex-felon status is an element of the charged offense and the defendant is prepared to stipulate to the fact of his or her conviction. In such cases, the nature of the prior conviction is simply irrelevant to the questions that the trier of fact must determine.

In this proceeding, the jury had to determine whether defendant had a diagnosed mental disorder that made him a danger to the health and safety of others in that he was likely to engage in sexually violent criminal behavior. (See Welf. & Inst. Code, § 6600, subd. (a).) The testimony about the details of defendant’s sex offenses was highly probative of these issues.

We confronted a nearly identical issue in *People v. Hubbard* (2001) 88 Cal.App.4th 1202, where we concluded that the trial court had not abused its discretion by admitting detailed evidence of numerous sexual assaults the defendant had committed, over his objection. Our analysis in that case is pertinent here: “Details about defendant’s past sexually violent conduct were important to the jury’s determination of these issues. The way that defendant targeted similar victims and committed the crimes in a similar manner showed his predatory behavior and the risk he posed if released. Although there was expert testimony on those issues, the details of the crimes were helpful for the jury’s understanding of the experts’ opinions and diagnoses. Although the details of the crimes were odious, it was necessary for the jury to learn not just that defendant had committed numerous sex offenses, but the scope and nature of his sexually predatory behavior.” (*Id.* at p. 1234.)

In sum, we conclude that the trial court did not err by allowing the prosecution to reject defendant’s proffered stipulation and to present detailed testimony of his prior offenses.

B. Equal Protection

Defendant contends that the SVPA is unconstitutional, in that it violates his right to equal protection. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) Specifically, he argues that the SVPA provides disparate treatment when compared to other involuntary civil commitment schemes, such as the MDO law (Pen. Code, § 2960 et seq.). He notes that in contrast to the MDO law, the SVPA does not provide for identification of an offender’s mental disorder or any treatment while the offender is in prison.

We recently rejected this argument, in *People v. Hubbard, supra*, 88 Cal.App.4th at p. 1221, where we explained that “persons committed under the SVPA are not similarly situated to persons committed under the MDO law . . . for this purpose.”

C. CALJIC No. 4.19

Defendant contends the trial court erred by instructing the jury pursuant to CALJIC No. 4.19 because the instruction did not require the jury to find that he was likely to engage in sexually violent *predatory* behavior, only that he was likely to engage in sexually violent *criminal* behavior.¹

As given, the instruction read, in full: “A petition for commitment has been filed with the Court alleging that the respondent, Bruce Gordon, is a sexually violent predator. The term sexually violent predator means a person who, first, has been convicted of a sexually violent offense against two or more victims with whom he had a predatory relationship as defined in this instruction for which he received a determinate sentence, and second, has a currently diagnosed mental disorder that makes him a danger to the health and safety of others, in that it is *likely that he will engage in sexually violent criminal behavior*. [¶] Sexually violent offense includes child molestation, in violation of Penal Code section 288(a), if the victim is under the age of fourteen and there is substantial sexual conduct between the victim and the perpetrator. [¶] Substantial sexual conduct means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation or masturbation of either the victim or the offender. [¶] As used in these instructions, masturbation is defined as any contact, however slight, of the sexual organ of the victim or the offender. [¶] A diagnosed mental disorder includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others. [¶] Danger to the health and safety of others does not require proof of a recent overt act while the offender is in

¹ The California Supreme Court is currently considering whether the SVPA requires the trier of fact to find that the defendant is likely to commit sexually violent *predatory* behavior if released. (*People v. Hurtado* (1999) 73 Cal.App.4th 1243, review granted Oct. 20, 1999 (S082112)).

custody. [¶] Recent overt act means criminal act that manifests a likelihood the actor may engage in sexually violent predatory criminal behavior. [¶] *Predatory* means an act directed towards a stranger or a person of casual acquaintance with whom no substantial relationship exists or an individual with whom a relationship has been established or promoted for the primary purpose of victimization. [¶] This is not a criminal trial. However, the petitioner has the burden of proving beyond a reasonable doubt the respondent is a sexually violent predator. [¶] Reasonable doubt in these proceedings is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. [¶] It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction that the respondent is a sexually violent predator. [¶] In determining whether the respondent is a sexually violent predator, you should consider all the evidence introduced in the case, including the prior convictions of one or more crimes previously listed for you. [¶] However, you may not find respondent to be a sexually violent predator based on prior offenses without evidence of a currently diagnosed mental disorder that makes him a danger to the health and safety of others, in that it is likely that he will engage in *sexually violent criminal behavior*. [¶] You must not be influenced by pity for or prejudice against the respondent. You must not be biased against the respondent because the petition has been filed or because the trial is being conducted. [¶] You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both parties have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict regardless of the consequences. [¶] If, after a consideration of all the evidence, you have a reasonable doubt that the respondent is a sexually violent predator, you must find that he is not a sexually violent predator and find the allegation in the petition is untrue.” (Italics added.)

CALJIC No. 4.19 tracks the definition of sexually violent predator contained in Welfare and Institutions Code section 6600, subdivision (a)(1).² That section defines a sexually violent predator as “a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in *sexually violent criminal behavior*.” (Italics added.) This definitional language does not expressly require a finding that the defendant is likely to engage in sexually violent *predatory* behavior.

Defendant argues that the SVPA impliedly requires such a finding. He points out that the SVPA refers to *predatory* behavior in several sections. Section 6600, subdivision (a)(3) specifies that “[t]he details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence.” Section 6600, subdivision (e) defines “predatory” as an act that is “directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.” Sections 6601.5, 6602, and 6602.5 require the judge at the probable cause hearing to determine whether there is “probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.” Finally, section 6607 requires the Director of Mental Health to recommend conditional release if he or she “determines that the person’s diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community.” On the other hand, the SVPA uses the term “sexually violent criminal behavior” in sections other than section 6600, subdivision (a)(1). (E.g., §§ 6605 [annual

² Further section references are to the Welfare and Institutions Code.

show cause hearing], 6608 [petition for conditional release and subsequent unconditional discharge].)

Recently, in *People v. Torres* (2001) 25 Cal.4th 680, 687, the California Supreme Court concluded that under the SVPA, the trier of fact at the trial is *not* required to find that a defendant's *prior convictions* involved predatory acts. However, the court left open the question presented here. The *Torres* court did note the anomalies in the statutory scheme, such as "the Act's use of dissimilar language to define a 'predatory act' and a 'sexually violent predator.'" (*Id.* at p. 682.) It also termed it "unusual" that the SVPA "requires the court at a probable cause hearing to decide whether the defendant 'is likely to engage in sexually violent predatory criminal behavior upon his or her release' (§ 6002, subd. (a)), but [] does not expressly provide for such an issue to be decided by the trier of fact at the trial." (*Id.* at p. 686.)

We agree with defendant that the SVPA impliedly requires a finding, at trial, that the defendant is likely to engage in sexually violent *predatory* criminal behavior if he or she is released. First, the SVPA is explicitly aimed at identifying, committing, and treating sexually violent *predators* and it explicitly defines the term "predator." We see no reason the Legislature would define the term "predator" but not expect the trier of fact to find that the defendant is likely to engage in sexually violent *predatory* criminal behavior instead of simply sexually violent criminal behavior. As the *Torres* court pointed out, certain sexually violent criminal offenses, such as spousal rape, "would rarely be 'predatory' as the Act uses that term." (*Torres, supra*, 25 Cal.4th at p. 684.)

Second, we see no reason why the Legislature would set forth a more stringent definition of sexually violent predator for purposes of the probable cause hearing than for purposes of trial. Like a preliminary hearing in criminal cases, the primary purpose of a section 6602 probable cause hearing is to "weed out groundless or unsupported charges" and to "relieve the accused of the degradation and expense of a . . . trial." (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 91; see also Witkin & Epstein, Cal. Crim. Law

(3d ed. 2000) volume 4, chap. XII, § 117, p. 320.) The probable cause hearing is designed to test the sufficiency of the evidence supporting the SVPA petition. It would be illogical to require the judge at the probable cause hearing to determine whether the defendant is likely to engage in sexually violent *predatory* criminal behavior while the trier of fact at the trial need only determine whether the defendant is likely to engage in sexually violent criminal behavior.

The fact that section 6600, subdivision (a)(1) does not include the term “predatory” in its definition of sexually violent predatory may be a drafting error. That section has used the phrase “sexually violent criminal behavior” since the SVPA was first introduced by Assembly Bill No. 888 (1995-1996 Reg. Sess.) on February 22, 1995. Indeed, the original bill did not use the phrase “sexually violent predatory criminal behavior” at all. Section 6602 was drafted using the phrase “sexually violent criminal behavior” and section 6607 contained the phrase “acts of sexual violence.”

When Assembly Bill No. 888 was amended on April 17, 1995, a definition of the term “predatory” was added to section 6600, subdivision (a). In addition, the phrase “sexually violent predatory criminal behavior” was used in section 6602, and the phrase “acts of predatory sexual violence” was used in section 6607. The analysis of Assembly Bill No. 888, as amended on April 17, 1995, stated that the bill would “[d]efine[] a sexually violent predator as a person who has been convicted of a sexually violent offense and who has a mental abnormality or personality disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent predatory criminal behavior.” (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 888 (1995-1996 Reg. Sess.) as amended Apr. 17, 1995.) Thus, it appears the Legislature may have actually intended to define a sexually violent predator with reference to the phrase “sexually violent predatory criminal behavior.”

The legislative history and purpose of the SVPA persuade us that defendant’s claim is correct: at trial, the trier of fact must find that the defendant is likely to engage in

sexually violent predatory criminal behavior. Although CALJIC No. 4.19 included the definition of “predatory,” it did not explicitly require the jury to use that definition in making its ultimate determination of whether defendant was a sexually violent predator.

We evaluate this instructional error under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Flood* (1998) 18 Cal.4th 470, 503 [omission of single element of offense].) In this case, the error was clearly harmless beyond a reasonable doubt. The evidence established that all of defendant’s prior offenses involved boys with whom he established or promoted a relationship for the primary purpose of victimization. Specifically, as described by Dr. Maram, defendant “groomed” his victims by building friendships, trust, and an illusion of safety. After establishing such relationships, he would molest the boys. He molested each of his victims over a long time period. Moreover, defendant admitted that in 1999, he continued to fantasize about boys, and he continued to obtain and possess child “lures” such as videos. There was overwhelming evidence that he was likely to engage in sexually violent *predatory* criminal behavior. Therefore, the instructional error was not prejudicial.

D. Ex Post Facto and Double Jeopardy

Defendant contends the SVPA is punitive in nature and that it violates the federal constitutional prohibitions against ex post facto laws and double jeopardy. We rejected the same arguments in *People v. Hubbart, supra*, 88 Cal.App.4th at p. 1226, where we explained: “In *Hubbart v. Superior Court* [(1999)] 19 Cal.4th [1138] at pages 1171-1177, the California Supreme Court determined that the SVPA does not impose punishment for criminal conduct and thus does not implicate ex post facto concerns. That holding is binding on this court (*Auto Equity Sales, Inc. v. Superior Court* [(1962)] 57 Cal.2d [450,] 455) and disposes of defendant’s double jeopardy claim by necessary implication. The determination that the act is not punitive ‘removes an essential prerequisite for both . . . double jeopardy and ex post facto claims.’ [Citation.]” (Fn. omitted.)

III. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

WUNDERLICH, J.

O'FARRELL, J.*

Trial Court:

Santa Clara County Superior Court
Superior Court No.: 210527

* Judge of the Monterey Superior Court sitting under assignment by the Chairperson of the Judicial Council.

Trial Judge:

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